No. 254.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

THOMAS HAMMERSCHMIDT ET AL., PETITIONERS,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

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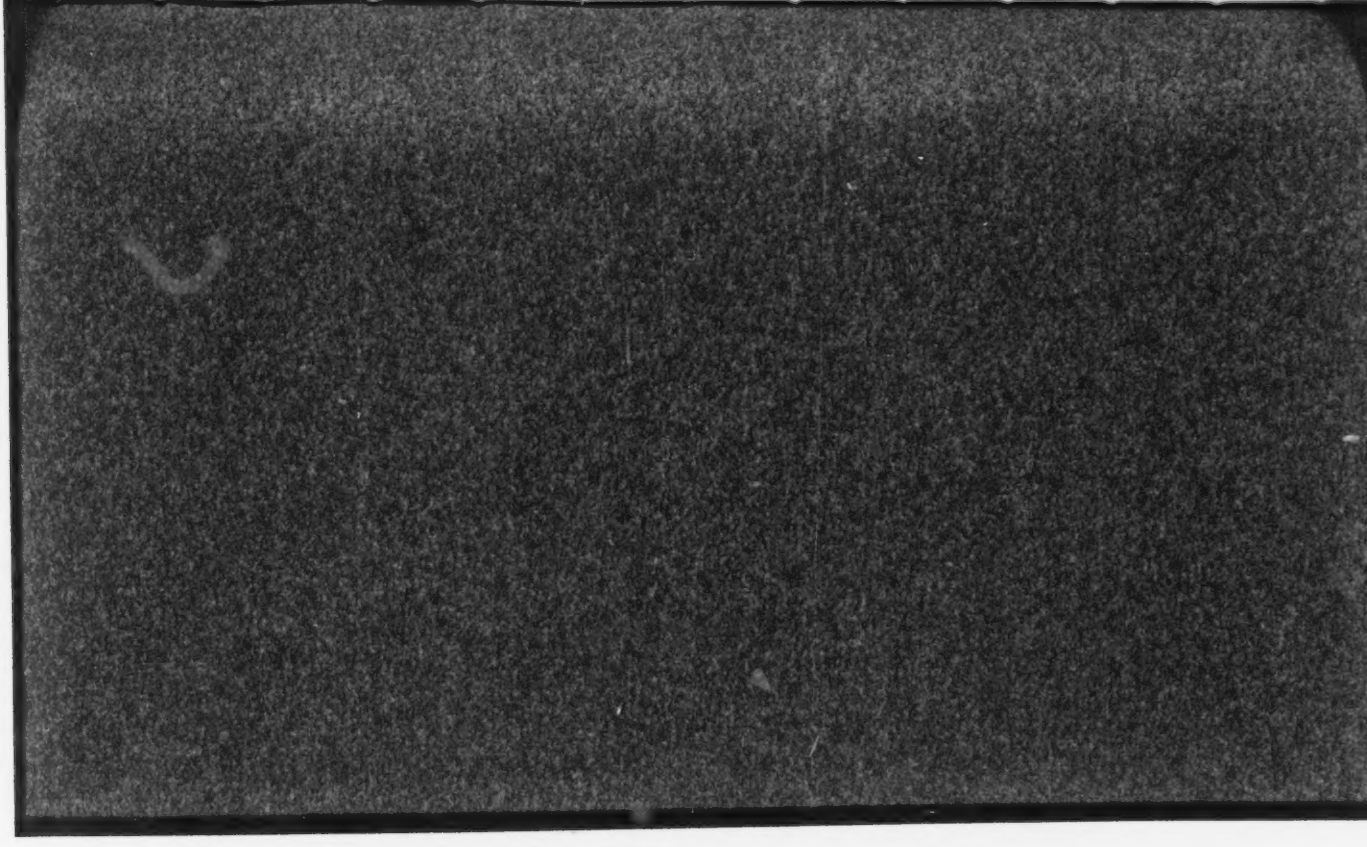

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STATEMENT.

Petitioners were convicted (R. p. 14) in the District Court of the United States for the Western Division of the Southern District of Ohio, under an indictment (R. p. 1) in one count, charging with great particularity and detail that petitioners at a specified time and place wilfully and unlawfully conspired "to defraud the United States by impairing, obstructing and defeating a lawful function of the Government of the United States," to wit, the function of registering for military service all male persons between the ages of twenty-one and thirty as required by the Selective Service Act of May 18, 1917. It charged that such conspiracy was to be accomplished

"by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, handbills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counselling, advising, aiding and procuring said persons—to evade, and refuse to obey the requirements of said Act of Congress * * *." The commission of five overt acts is charged and each is described in detail. The first relates to the act of ordering from the Queen Card Company fifty thousand handbills, an exact copy of which is inserted (R. p. 2) and "made a part of this indictment." The remaining four have to do with the receiving and distributing of the aforesaid handbills to various named persons.

The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of conviction and rendered an exhaustive opinion sustaining the indictment (R. p. 36). Judge Denison dissenting (R. p. 41) upon the ground that the acts of petitioners did not constitute a fraud upon the United States.

QUESTIONS.

The cause comes before this court on writ of certiorari granted at the October Term, 1922, based on the sole ground that the indictment is insufficient. Petitioners contend firstly, that the the facts of this case as disclosed by the record do not amount to a

conspiracy to defraud the United States; secondly, that if they do, such conspiracy is inadequately charged, and thirdly, that if the indictment be otherwise good it constitutes a violation of the First Amendment to the Constitution.

ARGUMENT.

I.

The facts charged in the indictment constitute a conspiracy to defraud the United States.

Section 37 of the Penal Code makes it a felony to conspire to defraud the United States in any manner or for any purpose.

The purpose of the statute is to secure the wholesome administration of the laws and affairs of the United States.

United States v. *Moore*, 173 Fed. 122.
United States v. *Stone*, 135 Fed. 392.

It is not limited to conspiracies to deprive the United States of property or money, but is broad enough to cover any conspiracy to defraud the United States of any right, including the obstruction of the lawful functions of any department of the Government.

Haas v. *Henkel*, 216 U. S. 462;
Hyde v. *Shine*, 199 U. S. 62, 78 et seq.;
United States v. *Foster*, 233 U. S. 515;
United States v. *Keitel*, 211 U. S. 370, 393;
United States v. *Sacks*, 257 U. S. 37;
United States v. *Janowitz*, 257 U. S. 42;
Firth v. *United States*, 253 Fed. 36;
United States v. *Galleanni*, 245 Fed. 977,

and the conspirators may not escape the consequences of their agreement to do an illegal thing because they did not resort to deception or trickery.

> *Haas* v. *Henkel, supra;*
> *United States* v. *Slater,* 278 Fed. 266, 269;
> *Edwards* v. *United States,* 249 Fed. 686;
> *Horman* v. *United States,* 116 Fed. 350.

In *United States* v. *Galleanni, supra,* the facts were one with the case at bar. In discussing the sufficiency of count two, charging a conspiracy to defraud the United States, District Judge Morton said at page 978:

> The United States was entitled to have persons subject to registration perform their duty and register according to law; and a conspiracy to prevent their doing so was a conspiracy to deprive the United States of a right to which it was entitled, and therefore to defraud it, within the meaning of Section 37,

citing *Haas* v. *Henkel, supra,* and *Curley* v. *United States,* 130 Fed. 1.

In *Firth* v. *United States* (C. C. A. 4th Cir.) supra, the defendants were charged with conspiracy to defraud the United States by obstructing the Draft Law, the indictment being in substantially the same language as that used in the case now under consideration. The court held that such a conspiracy was one to defraud the United States by obstructing a function of the Government.

The Selective Service Act, among other things, required that all male citizens between the ages of

twenty-one and thirty should register for service in the military and naval forces of the United States.

In the face of this statute petitioners caused to be printed with the idea of distributing to the public at large several thousand handbills attacking the Draft Act and counselling or commanding to "Refuse to Register for Conscription." The indictment avers that a number of them were distributed. The conduct of petitioners constituted a conspiracy to defraud the United States in that the intention and necessary effect of their agreement and acts was to obstruct and defeat the purpose of a measure enacted by Congress for the preservation of the Government. Such conduct was not within the criminal provisions of the Selective Service Law (Sections 5 and 6), and at the time of the commission of the alleged offense the Espionage Act had not been enacted into law.

The United States Attorney who drafted the indictment in the case at bar found in the decisions of this court a definition of the scope of Section 37 of the Penal Code which seemed to apply to the precise situation with which ne was confronted. On page 479 of the opinion rendered in *Haas* v. *Henkel*, *supra*, Mr. Justice Lurton, speaking for the court, said:

> But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.

The indictment herein is drawn in the language above quoted.

A majority of the Circuit Court of Appeals, after full consideration of the law and the facts of the case at bar, reached the conclusion (R. p. 37–39) that the indictment charged a conspiracy to defraud the United States.

It is argued (Brief, p. 15) that petitioners did not conspire to impair the functions of "the department of military registration." The indictment is not so narrow. It charges a conspiracy to impair the *function of registration*. Such function is a mutual and reciprocal obligation, requiring (1) that persons within the terms of the Draft Law present themselves for registration, and (2) that the Government officials examine applicants and make a record of their qualifications for military service. The duties of registration officials are a part of such function only. The term obviously refers to the *entire activity of registration* and includes whatever is done by the applicants as well as the acts of Government employees who examine applicants and make a record of the information so obtained. It is, therefore, fallacious to contend that there was no interference with the function of registration because petitioners did not hinder or obstruct registration officials in the performance of their office.

Judge Denison in a dissenting opinion (R. p. 41) states that the following is the question in the case:

> Thus the question is "Does one who stands upon his supposed right to refuse to obey an

> unconstitutional law thereby 'defraud' the United States, if it turns out that the law was valid?"

The question on the record here before the court is not so narrow. The real question is whether a conspiracy organized for the express purpose of depriving the Government, through the distribution of circulars and other literature containing gross misstatements of fact, of the services of those upon whom the country must rely in the hour of national peril, does not, if consummated, thereby defraud the United States in the broad sense in which the term defraud is used in Section 37 of the Penal Code.

II

The indictment is good in form.

The sole objection to the form of the indictment is that a copy of the handbills which petitioners were charged with having distributed is not set forth verbatim in the conspiracy part of the indictment, as distinguished from that part describing overt acts.

It is true that an indictment for conspiracy must charge the unlawful agreement complete and distinct in itself, and the conspiracy averments will not be aided by a description of the overt acts by which it was attempted to accomplish its object.

Joplin Mercantile Co. v. *United States*, 236 U. S. 531;

United States v. *Richards*, 149 Fed. 443;

But in charging a conspiracy the tenor of an instrument need not be set out verbatim.

In *United States* v. *Grunberg*, 131 Fed. 137, Circuit Judge Putnam, speaking for the court says on page 139:

> In the Federal courts, at least, it is not necessary to allege the tenor of an instrument unless it touches the very pith of the crime itself, as forgery or counterfeiting. The tenor of an instrument is never alleged in conspiracy indictments of the class at bar, where, as we have said, the setting out of the means is only incidental to the description of what is the substance of the offense.

The following cases are directly in point.

> *United States* v. *Golleanni*, *supra*.
> *United States* v. *Winslow*, 195 Fed. 578, 582.
> *United States* v. *Heinze*, 161 Fed. 425, 428.
> *Pooler* v. *United States*, 127 Fed. 509, 517-518.
> *United States* v. *French*, 57 Fed. 382.

The case of *Pierce* v. *United States*, 252 U. S. 239, furnishes a recent example of the practice of merely describing seditious documents in an indictment for conspiracy. This was a prosecution for conspiracy to commit the offense of causing disloyalty in the military and naval forces of the United States, denounced in Section 3 of the Espionage Act. Among other means, it was charged that the conspiracy was to be accomplished by the distribution of a seditious pamphlet entitled "The Price We Pay." As regards setting forth the publication complained of, the

pleader followed the plan upon which the indictment in the case at bar is drawn; that is, the character and effect of the pamphlet are described in the charge of conspiracy and it is set out verbatim in another part of the indictment. The substance of the second count is set forth on page 241 of the opinion and is approved by this court on page 243.

III.

The First Amendment.

Petitioners allege that their conviction was in violation of the First Amendment, which protects free speech. The handbills here involved contain language not less objectionable than that condemned in *Schenck* v. *United States*, 249 U. S. 48, in which Mr. Justice Holmes, speaking for the court, said, at page 52:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.

See also *Frohwerk* v. *United States*, 249 U. S. 204.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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EARL J. DAVIS,
Assistant Attorney General.
CLIFFORD H. BYRNES,
Special Assistant to the Attorney General.
February, 1924.

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